United States Court of Appeals
FOR THE FEDERAL CIRCUIT

93-5082

STEPHEN C. VIERRETHER,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

Judgment

ON APPEAL FROM THE
UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 91-1482C

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED.

Per Curiam (PLAGER and RADER, *Circuit Judges*, and WOODS, *District Judge**). See Fed. Cir. R. 36.

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* Judge George E. Woods, United States District Court for the Eastern District of Michigan, sitting by designation.

ENTERED BY ORDER OF THE COURT

/s/
Francis X. Gindhart, Clerk

DATED September 8, 1993

United States Court of Appeals
FOR THE FEDERAL CIRCUIT

93-5082

STEPHEN C. VIERRETHER,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED, and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on October 21, 1993.

FOR THE COURT,

/s/
FRANCIS X. GINDHART, CLERK
By Diane M. Frye
Chief Deputy Clerk

Dated: October 14, 1993

cc: EUGENE R. FIDELL
DEAN L. GRAYSON

VIERRETHER V. US, 93-5082
(CFC - 91-1482C)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

In the United States Court of Federal Claims

No. 91-1482C

(Filed: December 23, 1992)

STEPHEN C. VIERRETHER, *Plaintiff,* v. THE UNITED STATES, *Defendant.*	)	Military back pay; reduction in force program; right to predischarge hearing.

Eugene R. Fidell, Washington, D.C., for plaintiff. Mary G. Hynes, of counsel.

Dean L. Grayson and Hillary A. Stern, Civil Division, Washington, D.C., with whom were David M. Cohen, Director; Sharon Y. Eubanks, Assistant Director; and Stuart M. Gerson, Assistant Attorney General, for the defendant. Paul Samuel Smith, U.S. Department of Transportation, of counsel.

OPINION

MARGOLIS, Judge.

This military back pay case comes before the court on the defendant's motion for summary judgment and the plaintiff's cross motion for summary judgment. The

plaintiff, Stephen Vierrether, is a former Chief Boatswain's Mate in the Coast Guard. The Coast Guard instituted an involuntary reduction in force program during 1988, and through this program Vierrether was involuntarily, but honorably, discharged from the Coast Guard on June 2, 1988. Vierrether alleges that the Coast Guard discharged him without a hearing before the Coast Guard administrative discharge board prior to his discharge. He contends he is entitled to such a hearing under Coast Guard personnel regulations and under the Due Process Clause of the U.S. Constitution. He also attacks his discharge for various procedural defects and alleges that the decision of the Coast Guard Deputy General Counsel upholding his discharge was arbitrary and capricious and void because it came after the statutory time deadline. He seeks correction of his military records, back pay and allowances, attorney's fees and costs.

After careful review of the record and after oral argument, this court finds that the defendant is entitled to judgment as a matter of law. Accordingly, the court grants defendant's summary judgment motion and denies the plaintiff's cross motion for summary judgment.

FACTS

The RIF Program

In December 1987, Congress enacted a budget that restricted the appropriation for the Coast Guard. This caused a budget shortfall. The Coast Guard Command opted to meet the shortfall in part by reducing its personnel. The Coast Guard first implemented a program to permit personnel to leave the service voluntarily, known as the "voluntary early out program." This

program failed to reduce personnel sufficiently. The Coast Guard then instituted, on February 23, 1988, an involuntary reduction in force ("RIF") program. The order implementing the RIF was known as ALCOAST 22/88[1]. ALCOAST 22/88 announced that any enlisted service member who met the following criteria was a candidate for an involuntary discharge:

> A. has a characteristic average of less than 3.0 for any factor using all marks assigned on two most recent performance evaluations prior to [date time group] of this ALCOAST . . . .
>
> B. is presently on performance probation in accordance with art. 12-B-9 of [Coast Guard Personnel Manual].
>
> C. has, prior to this [message], been awarded nonjudicial punishment/convicted by a summary court martial two or more times in the preceding 12 months.
>
> D. has been convicted by a special or general court-martial within the preceding 24 months.

In normal circumstances, Coast Guard members with 8 or more years of military service are entitled to a hearing before an administrative discharge board, if the Coast Guard intends to discharge them involuntarily prior to the end of their term of enlistment. ALCOAST 22/88 suspended the right to a hearing for members to be

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[1] The term "ALCOAST" is a designation used to identify directives from the highest levels of the Coast Guard: the Commandant, the Vice-Commandant or the Chief of Staff of the Coast Guard.

discharged under the RIF program.[2]

The plaintiff, Stephen Vierrether, had served in the Coast Guard for over 17 years and achieved the rank of Chief Boatswain's Mate. Although the parties disagree as to how to characterize Vierrether's overall performance, there appears to be no dispute that Vierrether's performance evaluations met one of the criteria in ALCOAST 22/88.[3] For the two most recent evaluations prior to ALCOAST 22/88, Mr. Vierrether's evaluations had a characteristic average of less than 3.0 for a t least two factors on the performance evaluation. The plaintiff claims that those particular performance evaluations were the result of bias and prejudice against him.

On March 17, 1988, the Coast Guard issued another order, ALCOAST 25/88. ALCOAST 25/88 applied to all of the Coast Guard members who met the criteria in ALCOAST 22/88. ALCOAST 25/88 asked commanding officers to submit the names of any members who the commanding officer could recommend to be retained in the Coast Guard. ALCOAST 25/88 established a panel to review these recommendations to determine which members would be retained. It further directed the Coast Guard to Retain members who had 18 or more years of

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[2] The order explained specifically that "those members COMDT (G-PE) directs to be discharged under this program will receive a [convenience of the government] discharge [in accordance with] Art. 12-B-12a(1) of [the Coast Guard Personnel Manual]. For the purpose of this involuntary RIP program, the requirement for completion of a probationary period under Art. 12-B-9 of [the Coast Guard Personnel Manual] is suspended, as is the requirement for an admin[istrative] discharge board for members with 8 or more [years] of military service."

[3] From the record it appears that service members, including Vierrether, are evaluated at least twice each year. Each evaluation measures a service member's performance using six overall "factors": military factor, team factor, work factor, leadership factor, representation of the Coast Guard factor, and human factor.

service until they were eligible to retire.

Vierrether's commanding officer recommended that the Coast Guard retain Vierrether because Vierrether had service of 17 years and 9 months. A panel of coast Guard officers and enlisted personnel thereafter reviewed Vierrether's entire military service record and decided to discharge him. Vierrether requested a waiver to allow him stay in the service until he reached 20 years of service, but this request was denied. Vierrether was discharged on June 2, 1988, with an honorable discharge and an RE-4 code on his discharge form indicating that he was not permitted to reenlist.

The BCMR Review

On June 3, 1988, Vierrether submitted a petition to the Coast Guard Board for Correction of Military Records ("BCMR") pursuant to 10 U.S.C. § 1552, seeking to set aside his discharge. Vierrether argued that it was unlawful for the ALCOASTs to suspend the right to a hearing before an administrative discharge board. He argued on several grounds that the ALCOASTs purported suspension of that right was ineffective, that he had a separate right to predischarge hearing under the Due Process Clause, and that his performance evaluations were the product of bias and prejudice.

The BCMR concluded that the Coast Guard violated its regulations by refusing Vierrether a predischarge hearing.[4] The Deputy General Counsel ("Depu-

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[4] According to the plaintiff, this decision was actually the second BCMR ruling on his case. On or about December 13, 1989, the BCMR rendered a "first decision" in Vierrether's favor, and it forwarded this decision to the Coast Guard Deputy General Counsel for approval. The Deputy General Counsel reviewed this first decision and suggested that

ty"), acting on behalf of the Secretary of Transportation, overruled the BCMR's decision on April 18, 1991 and denied Vierrether's petition. The Deputy adopted the factual findings of the BCMR, but concluded that it was lawful to suspend the right to a hearing, the suspension was effective against Vierrether, and that an honorable discharge does not trigger any Due Process rights. Both the BCMR and the Deputy found no evidence of bias or prejudice in Vierrether's evaluations. This lawsuit followed.

DISCUSSION

The plaintiff bears a heavy burden of proof. This court may not reverse the Secretary's decision to overrule a BCMR decision unless the plaintiff can show, by "cogent and clearly convincing evidence," that the Secretary acted arbitrarily, capriciously, in bad faith, contrary to law or regulations, or that his determination was not supported by substantial evidence. *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Jones v. United States*, 7 Cl. Ct. 673, 679 (1985); *Sanders v. United States*, 219 Ct. Cl. 285, 301-02 (1979). A court may not substitute its judgment for that of the Board of the Secretary if reasonable minds could differ. *Jones*, 7 Cl. Ct. at 679; *Sanders*, 219 Ct. Cl. at 302. This is true particularly in military back pay cases, because courts are obligated to allow the greatest deference to the armed services in their administration of personnel matters. *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953); *Sanders*, 219 Ct. Cl. at 302.

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the BCMR consider additional arguments.

This court's analysis starts with 10 U.S.C. § 1169, which provides that "[n]o regular enlisted member of an armed force may be discharged before his term of service expires, except (1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court martial; or (3) as otherwise provided by law." 10 U.S.C. § 1169 (1988). This court and its predecessor, the Court of Claims, have frequently held that, so long as no statutes or regulations are violated, enlisted personnel in military service do not have a right to remain in the service until the expiration of their terms of enlistment. *Giglio v. United States*, 17 Cl. Ct. 160, 166 (1989); *Keef v. United States*, 185 Ct. Cl. 454, 463 (1968). Therefore, the plaintiff's discharge is void only if it exceeds applicable statutory authority, if it ignores procedural regulations or if it violates minimum concepts of basic fairness. *Giglio*, 17 Cl. Ct. at 166.

The plaintiff attacks his discharge on each of these grounds. His arguments cluster into several themes. First, he argues that the entire RIF program violated Coast Guard regulations. Seconds, he argues that he had a right to a hearing before an administrative discharge board prior to being discharged. Third, he argues he had a right to a predischarge hearing under the Due Process Clause. Fourth, he contends that the Deputy General Counsel and the BCMR acted arbitrarily and capriciously in failing to find that his performance evaluations were the product of bias and prejudice. Fifth, he argues that the decision of the Deputy General Counsel is void because it came after the statutory deadline.

I. Validity of the RIF Program

ALCOAST 22/88 specified that service members discharged under the RIF program would receive a dis-

charge for "convenience of the government." Vierrether alleges that the RIF program violated Coast Guard regulations on discharges for the convenience of the government. The Coast Guard Personnel Manual ("personnel manual") limits the circumstances in which the Coast Guard can discharge a service member for the convenience of the government. It provides that:

> a. The Commandant may authorize or direct the separation of enlisted personnel for the convenience of the Government for any of the following reasons:
>
> (1) General demobilization, reduction in authorized strength or by an order applicable to all members of a class of personnel specified in the order.

CGPM art. 12-B-12(a)(1). Vierrether argues that none of these three reasons applied to the RIF program. Because the parties agree that the first two reasons cannot justify this RIF program, the dispute centers on whether ALCOAST 25/88 was an order "applicable to all members of a class of personnel specified in the order." Each party offers a different interpretation of that phrase.

The defendant's interpretation focuses on the plain language of the regulation. The defendant notes that the personnel manual requires an order to apply to "a class" of personnel specified in the order. The defendant contends that ALCOAST 25/88 created three classes of personnel within the group authorized for discharge under ALCOAST 22/88: (1) those members whose commanding officers recommended them for retention; (2) those members whose commanding officers did not recommend them for retention; and (3) regardless of the

recommendation, those members with 18 years of service. ALCOAST 25/88 directed those in the first class to be considered for retention; it directed those in the second class to be discharged; and it offered a retirement option to those in the third class. The order to discharge members applied to all members in the second class of personnel. Therefore the order literally applied to "all members of a class of personnel specified in the order." This is consistent with the literal requirements in the personnel manual. According to this interpretation, it is no defect that the Coast Guard opted to retain some of the personnel in the first class.

The plaintiff contends that ALCOAST 25/88 violated the personnel manual. According to the plaintiff's interpretation, the relevant class of personnel is the class identified by the criteria in ALCOAST 22/88. ALCOAST 25/88 was unlawful because it ordered only some of the personnel in that class to be discharged, others to be retained permanently, and still others to be retained until retirement. Therefore, according to the plaintiff, ALCOAST 25/88 was not "applicable to all members" of the class specified in ALCOAST 22/88.

This court agrees with the defendant's interpretation of the personnel manual article 12-B-12(a)(1). That interpretation adheres to the literal wording of the regulations more closely than the plaintiff's interpretation. The regulation requires only that an order "apply to all members of a class of personnel specified in the order." ALCOAST 25/88 does exactly that because it applies to the class of members not recommended for retention. By contrast, using the plaintiff's interpretation would require the court to read the language to say that an order to discharge is valid only if it apply to all members of a class of personnel specified in that order or any related order. Such language is absent from the

regulation. The plain language is the best indication of the intent of a provision and is conclusive when there is no clear cut contrary intent. *See Madison Galleries, Ltd. v. United States*, 870 F.2d 627, 629-30 (Fed. Cir. 1989) (interpreting a statute).

The plaintiff complains that the purpose of article 12-B-12(a)(1) is to constrain the Coast Guard's discretion in discharging personnel for the convenience of the government, so the Coast Guard may not make individualized decisions about which members to discharge. Unfortunately, there is no authority interpreting this regulation that either supports the plaintiff's argument or contradicts it. Even if the plaintiff is correct, however, the argument would not help him. The Coast Guard made the alleged individualized decisions to retain some members after first identifying the personnel to be discharged. If the decision to retain some members was unlawful, the result would be to discharge all members meeting the criteria in ALCOAST 22/88. Vierrether would have been discharged even if there were no individualized decisionmaking. For all of these reasons, this court holds that the RIF program did not violate internal Coast Guard regulations.

II. Rights Under Coast Guard Regulations

Next, the plaintiff contends that the Coast Guard unlawfully denied him the right to a pre-discharge hearing before an administrative discharge board, to which he claims he was entitled under Coast Guard regulations. He makes numerous arguments.

A. Rights to a Predischarge Hearing in the Personnel Manual and the Investigations Manual

The plaintiff argues that two internal Coast Guard manuals state that service members with 8 or more years of service are entitled to an administrative discharge board hearing if they are to be discharged prior to the end of their enlistment. The first is the Coast Guard Personnel Manual. The second is the Administrative Investigations Manual ("investigations manual").

The plaintiff makes three arguments to the effect that either one or both of these manuals required that the Coast Guard grant him a hearing. First, he argues that each manual grants rights separately from the other, and the ALCOASTs only suspended those rights granted in the personnel manual, not those rights in the investigations manual. Therefore the provisions of the investigations manual granting a right to a hearing before the administrative discharge board remained effective. The plaintiff made this argument before the BCMR. The BCMR found it persuasive, but the Deputy General Counsel, acting on behalf of the Secretary, overruled the BMCR decision. The Deputy held that the investigations manual does not create rights separate from those in the personnel manual. Rather, the investigations manual only provides guidance for performing investigations that are authorized by other manuals. Therefore a change to the personnel manual also effects a change to the investigations manual.

This court may reverse the Deputy's decision only if the plaintiff shows that it was arbitrary, capricious, contrary to substantial evidence, or violated applicable law or regulations. *Boyd v. United States*, 207 Ct. Cl. 1, 8-9 (1975), *cert. denied*, 424 U.S. 911 (1976). The plain-

tiff has not met this standard.

There was substantial evidence supporting the Deputy's decision. She relied on language in the investigations manual itself that states it is a "general guide for investigations," and explains that "in the case of conflict [with other regulations], the other regulation will govern." This language strongly supports the conclusion that the personnel manual provisions control those of the investigations manual. The Deputy's decision articulated a reasonable basis in the record for her conclusion, and the plaintiff has offered little evidence that the decision was arbitrary, capricious, in bad faith, contrary to law or regulation, or that her determination was not supported by substantial evidence. It was immaterial that the Deputy cited a different version of the investigations manual than the version in effect at the time of Vierrether's discharge. The key language quoted above was in the correct version.

Second, the plaintiff argues that even if the personnel manual controls the provisions of the investigations manual, the personnel manual can only "modify" the provisions of the investigations manual, not "suspend" those provisions. The plaintiff asks the court to distinguish between a "modification" and a "suspension" of provisions. However, this court can discern no basis for such a distinction. The effect of ALCOAST 22/88 was to change the personnel manual to state that service members qualifying for a RIF are not entitled to an administrative discharge board hearing. That right continued to exist for all other service members. If this is not a "modification" of the manual, it is difficult to conceive what would be. Many modifications of the personnel manual may have the effect of suspending certain procedures for certain personnel or enhancing procedures for others.

Third, the plaintiff argues that the Commandant had no authority to suspend the provisions of either manual. Both the BCMR and the Deputy rejected this argument summarily, and this court sees no basis for reversing. Unquestionably, the Coast Guard Commandant has the authority to modify his own directives; the Coast Guard Directives system specifies that orders remain in effect until they are "replaced or cancelled" by the originator or higher authority. Both the personnel manual and the investigations manual are Commandant directives, as was ALCOAST 22/88. Therefore the Commandant did have the authority to suspend the provisions of both manuals. The plaintiff's contention that "suspending" a personnel manual provision is somehow different from "replacing or cancelling" a provision is equally unpersuasive. The effect of ALCOAST 22/88 was to replace personnel manual article 12-B-9 with a provision continuing the right to an administrative discharge board for most members but excepting those members targeted for discharge under the RIF program. Thus, it did "replace" the provision with a temporary new provision.

B. Cancellation of the RIF Program

Next, the plaintiff argues that Coast Guard cancelled the order creating the RIF program before it actually discharged Vierrether; therefore at the time of his discharge the right to a hearing was in effect. This argument also fails.

The order cancelling ALCOAST 22/88 was ALCOAST 34/88, given in May 1988, and it provided:

> 1. The programs promulgated . . . to reduce the number of enlisted personnel in the Coast Guard have had the desired effect. As of 13 May 88, over 850 enlisted members have been approved for separation or retirement under the voluntary and involuntary programs. Consequently, both the voluntary and involuntary enlisted personnel reduction programs are hereby terminated. All units with members being separated or retired have received authority for disch[arge]/relad or notification of approved retirement request by separate correspondence.
>
> 2. Members who have not already received approval or an early release will not be separate under this program. . . .

Vierrether received authority for his discharge in April 1988.

By the terms of ALCOAST 34/88, Vierrether was one of those "approved for separation" prior to the program's termination in May 1988. The plain language of ALCOAST 34/88 assumes that those service members authorized for discharge will be discharged and does not cancel directives authorizing the discharge of service members. This court therefore finds that ALCOAST 34/88 did not create any right to a hearing.

C. Notice of the Potential for Discharge

Finally, the plaintiff argues that his discharge was unfair because the Coast Guard changed its personnel regulations, and Vierrether had no previous notice that

his poor performance could cause him to be discharged without a hearing. This argument is also without merit.

The argument amounts to a due process challenge. Under due process analysis, an individual is entitled to certain procedures if he is deprived of a life, liberty or property interest. Vierrether, however, wa snot deprived of such an interest. Enlisted service members have no constitutional entitlement to remain in the service until the end of their terms of enlistment. *Keef*, 185 Ct. Cl. at 463-64. The Commandant has authority to issue, modify and rescind personnel rules, 14 U.S.C. § 632, and the Court of Appeals for the Federal Circuit has held that military service members have no entitlement to prevent the military from changing its personnel regulations. *Alberico v. United States*, 783 F.2d 1024, 1027 (Fed. Cir. 1986).

The plaintiff cites *Hanratty v. FAA*, 780 F.2d 33, 35 (Fed. Cir. 1985), for the proposition that a unilateral change in procedures is unfair. Hanratty, however, presented a different issue. Hanratty held that it violated due process for the Merit Systems Protection Board to use a standard for deciding the case that was different from the standard on the basis of which both parties submitted evidence. This is not the issue her.

III. Due Process Rights

The plaintiff next argues that his discharge casts a stigma on him, giving rise to a right to a hearing under the Due Process Clause of the U.S. Constitution. The settled rule is that if the regulations do not require notice and a predischarge hearing, they are required only if the discharge either casts a stigma on the service member or has some derogatory connotation. *Keef*, 185

Ct. Cl. at 467. The plaintiff claims that a stigma derives from the fact that the reenlistment code on his discharge document, an RE-4, bars his reenlistment. He claims that such a case, coupled with his long record of service, over 17 years, naturally tend to cast suspicion in the minds of employers over the circumstances of his discharge. The defendant argues that barring the plaintiff from reenlisting is not per se stigmatizing.

This court notes that honorable discharges may be stigmatizing if the discharge certificate includes a derogatory connotation. *Keef*, 185 Ct. Cl. at 467 (stating that notice and a hearing are required "only if the discharge, albeit honorable, either casts a stigma on the serviceman or has some derogatory connotation."). Two subsequent Claims Court cases held that an honorable discharge stigmatized a service member because the member's discharge certificate included derogatory information. *Casey v. United States*, 8 Cl. Ct. 234, 241 (1985) (discharge certificate included a code indicating the member wa discharged for drug and alcohol abuse); *Rogers v. United States*, 24 Cl. Ct. 676, 683-84 (1991) (same).

There is no derogatory connotation on Vierrether's discharge certificate; it merely states that he was discharged as a part of a general demobilization. Moreover, the Keef court considered facts virtually identical to the facts in this case and held that the plaintiff was not stigmatized. In *Keef* the service member had served 17 years and received reenlistment case RE-2 on his discharge form, which barred his reenlistment. The court concluded that the code, either by itself or when considered with plaintiff's long years of service, did "not indicate any derogatory reasons for denying him the opportunity to reenlist." It found that "the mere fact that he cannot re-enlist is not a stigma." *Keef*, 185 Ct.

Cl. at 469. The facts in *Keef* are the same in every material way to the facts in this case.

Keef is not distinguishable merely because Keef involved an RE-2 code while Vierrether's code is an RE-4. The only features about the RE-2 code that the *Keef* court found important were that it barred reenlistment and did not "indicate any derogatory reasons for denying [plaintiff] the opportunity to reenlist." *Keef*, 185 Ct. Cl. at 469. Both features are exactly the same for the RE-4 code used in this case. Accordingly, the plaintiff's claim that his discharge form stigmatized him is without merit.[5]

IV. The Performance Evaluations

The plaintiff challenges the findings of the BCMR and the Deputy General Counsel that there was no evidence of bias in Vierrether's performance evaluations. To establish that there was error, the plaintiff must prove two things: (1) that the Board proceedings contained legal error or a misstatement of a significant hard fact, and (2) that there was a causal nexus between the error and plaintiff's discharge. *Hary v. United States*, 223 Ct. Cl. 10, 17 (1980); *Sanders*, 219 Ct. Cl. at 301-02. The plaintiff's burden of proof is extremely high. This court will not substitute its judgment for that of the Coast Guard in evaluating the plaintiff's performance when reasonable minds could reach differing conclusions.

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[5] Even if plaintiff offered some evidence of a stigmatizing effect, it would not necessarily follow that due process requires that he receive a hearing prior to his discharge. A post-discharge hearing, such as his appeal to the BCMR, may be sufficient. *See Alberico v. United States*, 783 F.2d at 1028 (holding that service member is not necessarily entitled to predischarge hearing).

Sanders, 219 Ct. Cl. at 302.

The plaintiff has not met this burden. The court finds that the BCMR's determination is supported by substantial evidence in the record as a whole. First, there was substantial evidence in the record to conclude that the disputed performance evaluations were not aberrational, but consistent with the rest of the plaintiff's service record. Vierrether's performance evaluations were poor at times as early as 1984. He was frequently counseled to improve his performance. Once he was threatened with reduction in rate due to incompetency. It was also reasonable for the BCMR to accept unsworn evidence from either party. Regulations do not limit the BCMR in the kind of evidence it may consider. 33 C.F.R. § 52.24 (1991).

Moreover, the plaintiff's "sworn evidence" is insufficient to establish that Lt. Rall was biased or that there was a nexus between the alleged bias and the evaluations. The plaintiff must overcome the strong presumption that administrators of the military discharge their duties correctly, lawfully and in good faith. *Sanders*, 219 Ct. Cl. at 302. Vierrether's evidence consists of his own statement to the BCMR that there was a "personality conflict" between the plaintiff and Lt. Rall and that this conflict impaired Rall's ability to impartially evaluate the plaintiff's performance. He claims that Lt. Rall is not credible because Rall was personally involved with a supervisee of the plaintiff. Uncorroborated allegations are simply not enough to overcome the presumption that military officers, including Lt. Rall, discharge their duties faithfully. *Paskert v. United States*, 20 Cl. Ct. 65, 71 (1990) (citation omitted). Given the lack of evidence supporting the plaintiff's contentions, and without any apparent reason to do so, it was also not an error for the BCMR not to interview Lt. Rall.

Second, it was not an abuse of discretion for the Coast Guard to refuse to waive the 18-year service requirement to allow the plaintiff to continue his service until eligible to retire. The plaintiff simply did not have 18 years of military service.

Finally, he seems to claim that it was an abuse of discretion for the BCMR to permit the Coast Guard to discharge the plaintiff for past conduct. This last argument is merely a reformulation of his other legal arguments and is without merit.

V. The Statutory Deadline

The plaintiff next argues that the Deputy General Counsel was powerless to overturn the BCMR's decision granting relief to the plaintiff because the Deputy acted after a statutory deadline. Congress passed legislation requiring the Secretary to impose a 10-month deadline for final action on Coast Guard BCMR petitions. This legislation provides:

> Not later than 6 months after the date of the enactment of this Act, the Secretary of Transportation shall—
>
> (1) amend . . . [r]egulations . . . to ensure that a complete application for correction of military records is processed expeditiously and that final action on the application is taken within 10 months of its receipt.

Coast Guard Authorization Act of 1989, Pub. L. No. 101-225, § 212, 103 Stat. 1914 (1989).

This court finds that the 10-month rule does not apply to Vierrether's petition because the statute authorizing the deadline was not passed until well after this petition was filed. The plaintiff filed his petition with the Coast Guard BCMR on June 3, 1988. The legislation became effective on December 12, 1989. If the court applied the 10-month rule, the deadline for final BCMR action would have expired on April 2, 1989. Thus, by the time the rule came into being, the 10-month deadline for a BCMR decision on the plaintiff's petition had already passed. It would be illogical to withdraw the BCMR's authority to render a decision just because the BCMR failed to meet a deadline that did not exist at the time. The legislation does not explicitly require retroactive application, and this court will not infer retroactivity if it will lead to such a result.[6]

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[6] The plaintiff seeks to change this result by suggesting that the court begin counting the time period 6 months after the effective date of the statute, when the regulations implementing the deadline were supposed to have been issued. The statute does not direct the court to apply the deadline to petitions filed prior to the legislation, and it would be inequitable to impose such a deadline.

It also appears that the BCMR's so-called final decision was only a recommendation to the Deputy. It was undated and left a space for the Deputy's signature. The Secretary, acting through the Deputy, unquestionably has review authority over BCMR decisions. 33 C.F.R. § 52.64 (1991). And though the BCMR's decision was entitled "final decision," its label is not conclusive in light of the fact that a previous BCMR decision in this case, labeled a "final decision," was characterized by the BCMR chairman as a "recommended decision."

Because this court finds that the deadline does not apply to the BCMR petition, it need not reach the question of whether the deadline cuts off the Deputy's power to render a final decision.

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment is granted, and the plaintiff's cross motion for summary judgment is denied. The clerk will dismiss the complaint. No costs.

/s/
Lawrence S. Margolis, Judge
United States Court of Federal Claims

December 23, 1992

In the United States Court of Federal Claims

No. 91-1482 C

STEPHEN C. VIERRETHER)
)
v.)
)
THE UNITED STATES)

JUDGMENT

Pursuant to the court's opinion of December 23, 1992, granting defendant's motion for summary judgment, and denying plaintiff's cross motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

David A. Lampen
Clerk of Court

By:

Deputy Clerk

January 6, 1993

NOTE: As to appeal, 60 days from this date, see RUSCC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF
MILITARY RECORDS

Application for Correction of Coast Guard Record of:	)	BCMR Docket No. 278-88
VIERRETHER, Stephen C. 499 56 5277, BMC	)	

FINAL DECISION

JOOST, Chairman:

This is a proceeding under the provisions of Title 10, United States Code, §1552. It was commenced on June 1, 1988, by the filing of an application for correction.

The applicant, a former chief boatswain's mate (BMC; pay grade E-7) asked the Board to invalidate his involuntary discharge from the Coast Guard and to restore him to active duty. He was discharged from the Coast Guard on June 1, 1988 and assigned an RE-4 (not eligible for reenlistment) code. He alleged that is was an error and an injustice for the Coast Guard to discharge him, after nearly 18 years of active duty, without a hearing before an administrative discharge board. He alleged that such a hearing is required by the Personnel Manual for all members with more than eight years of active duty. The applicant's commanding officer recommended that he be retained in the Coast Guard until the first retirement opportunity, but the Comman lant rejected this recommendation and directed his discharge

pursuant to a reduction-in-force program (RIF).

The Coast Guard submitted a memorandum from the Chief, Enlisted Personnel Division as its advisory opinion. According to the advisory opinion, the Coast Guard "strongly recommend[ed]" to the opinion, the applicant was identified for involuntary discharge under a program implemented by the Commandant on February 23, 1988. Commanding officers of all units were instructed by the Commandant to identify those enlisted members "not meeting stipulated performance criteria and/or with disciplinary problems.

The Coast Guard asserted that the provision of the Personnel Manual that required a hearing before an administrative discharge board for any members with eight or more years of active duty was only a "policy" and not "required by statute or law." "Like any policy, it can be changed by the Commandant." The Coast Guard also pointed out that members with 18 years of active duty who met the involuntary discharge program criteria were "allowed to remain on active duty until 20 years service for retirement. Unfortunately, [the applicant] was a few months short of 18 years . . . ."

The applicant's attorney took sharp issue with the Coast Guard assertion that the requirement for a hearing was more "policy" that had no binding force. "The Coast Guard cannot walk away from a published regulation."

HEARING

The applicant required an oral hearing before the Board. Upon review of the submissions, the Chairman denied the request on the ground that the written record provides sufficient information to form the basis for an informed decision. The applicant's attorney notified the

Board that he did not desire reconsideration of that denial.

FACTS AND CONCLUSIONS

The Board makes the following findings of fact and conclusions of law on the basis of the applicant's submissions, the Coast Guard's response, the military record of the applicant, and applicable law.

1. The Board received the application within three years of the applicant's discovery of the alleged error or injustice, as required by Title 10, United States Code, §1552.

2. The applicant was first enlisted int he Coast Guard on June 29, 1970. He was honorably discharged, by reason of convenience of the Government, on June 2, 1988, after 17 years, 11 months, and 4 days active duty. He was not, prior to discharge, notified that he had a right to a hearing before a reenlistment board. AL-COAST 022/88, the authority for his discharge, provided in §5 thereof, that "The requirement for . . . is suspended, as is the requirement for an admin discharge board for members with 8 or more yrs of military service."

3. A Coast Guard regulation (Article 12-B-5, Personnel Manual) in effect at time the applicant was discharged, provided that a "members with 8 or more years of total . . . military service shall be notified, in writing, . . . That the members has the right to present the case and appear in person before a reenlistment board." That regulation was in effect at the time of promulgation of ALCOAST 022/88. It was not amended so as to repeal the right to a hearing for members subject to ALCOAST 022/88.

4. The Coast Guard, like every other agency of the Federal Government, is bound by its own regulations.

Service v. Dulles, 354 U.S. 363 (1957); *Casey v. United States*, 8 Cl. Ct. 234 (1985). The Commandant cannot change any or all of the Coast Guard's regulations at will; he certainly cannot change a regulation which vests important rights in senior personnel by an administrative message termed "HDQTRS TELECOMMUNICATIONS" which declares that an unspecified regulation is "suspended". The Coast Guard made no effort, aside from issuing this message, to change the regulation which guaranteed a hearing to a enlisted member with eight or more years service.

5. The Coast Guard erred in discharging the applicant without first holding a hearing, in violation of Article 12-B-5 of the Personnel Manual. Moreover, the Coast Guard committed an injustice in not granting the same rights to the applicant, who had served 17 years 11 months, and 3 days, as it granted to enlisted members who had served 18 years.

ORDER

The military record of former BMC Stephen C. Vierrether, 499 56 5277, USCG shall be corrected by setting aside the applicant's discharge and by directing that he be restored to active duty in the Coast Guard, with no break in service, within 50 days of the date of this order. The Coast Guard shall pay the applicant the amount due him as a result of this correction.

[SIGNATURES OF BCMR MEMBERS]

APPROVED: DATE: [UNDATED]

[UNSIGNED]
Rosalind A. Knapp
Deputy General Counsel
Delegate of the Secretary
Department of Transportation

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF
MILITARY RECORDS

Application for Correction of Coast Guard Record of	)	BCMR Docket No. 278-88
VIERRETHER, Stephen C. 499 56 5277, BMC	)	

FINAL DECISION

JOOST, Chairman:

This is a proceeding under the provisions of Title 10, United States Code, § 1552. It was commenced on June 1, 1988, by the filing of an application for correction.

The applicant, a former chief boatswain's mate (BMC; pay grade E-7) asked the Board to invalidate his involuntary discharge from the Coast Guard and to restore him to active duty. He also requested that certain performance evaluations and related entries in his service record be removed on grounds of bias and prejudice. His commanding officer had recommended that he be retained in the Coast Guard until the first retirement opportunity, but the Commandant rejected this recommendation and directed his discharge pursuant to a reduction-in-force (RIF) program. He was discharged from the Coast Guard on June 2, 1988 and assigned an RE-4 code (not eligible for reenlistment).

SUMMARY OF RECORD AND SUBMISSIONS

The applicant enlisted in the Coast Guard on June 29, 1970. During the next seventeen years, he was regularly promoted, eventually earning the rate of chief boatswain's mate. He saw nearly nine years of sea duty, earning numerous decorations and medals for conduct, polar service, and bravery.

In the winter of 1988, the Coast Guard, facing unexpected budgetary limitations, implemented an austerity program. This program consisted of deferred enlistments as well as a voluntary discharge option for enlisted personnel. However, in February 1988, the Commandant issued ALCOAST 022/88, which read:

> 1. The early release program . . . is not expected to fully achieve required personnel reduction goals. The following reduction in force (RIF) actions are therefore necessary:
>
> 2. Commanding officers/officers in charge are to identify enlisted members (including reserves on extended active duty) who meet any of the following criteria:
>
> > A. has a characteristic average of less than 3.0 for any factor using all marks assigned on two most recent performance evaluations prior to [the date and time] of this ALCOAST . . .
> >
> > B. is presently on performance probation . . .

> C. has, prior to this message, been awarded non-judicial punishment/convicted by a summary court martial two or more times in the preceding 12 months,
>
> D. has been convicted by a special or general court-martial within the preceding 24 months.
>
> 3. Units except those being closed/reduced on 1 Mar 88 . . . shall submit information required in paragraph 2 by message no later than 15 Mar 88. Units being closed/reduced on 1 Mar 88 shall submit the information required in paragraph 2 by message no later than 25 Feb 88 . . .
>
> 5. Those members Commandant directs to be discharged under this program will receive a Convenience of the Government Discharge in accordance with Article 12-B-12a(1) of [Personnel Manual]. For the purpose of this involuntary RIF program, the requirement for completion of a probationary period under Article 12-B-9 of [Personnel Manual] is suspended, as is the requirement for an administrative discharge board for members with 8 or more years of military service. . . .

The goal of this and similar ALCOASTs was apparently realized swiftly. ALCOAST 022/88 was rescinded in mid-May 1988.

An administrative message from Coast Guard Headquarters to the Cutter aboard which applicant was serving, dated April 1988 and marked "Routine," stated: "After a thorough review of [applicant's] service record by a panel of officers and enlisted personnel, Commandant has approved the discharge of [applicant] by reason of convenience of the government under Article 12-B-12a(1). Issue type discharge to which entitled (honorable or general) in accordance with Article 12-B-2. Assign Separation Code JCC and the appropriate reenlistment code. The basis for discharge is member has a characteristic average of less than 3.0 for at least one factor using all marks assigned on two most recent performance evaluations. Command shall make a page 7 entry . . . providing a brief explanation of the basis for the involuntary discharge."

On June 2, 1988, the applicant was honorably discharged, by reason of convenience of the Government, after 17 years, 11 months, and 4 days active duty.

In his application for correction, the applicant alleged that it was an error and an injustice for the Coast Guard to discharge him, after nearly 18 years of active duty, despite his commanding officer's recommendation to the contrary, without a hearing before an administrative discharge board. He alleged that such a hearing is required by both the Coast Guard Personnel Manual and the Administrative Investigations Manual for all members with more than eight years of active duty.

The Coast Guard submitted a memorandum from the Chief, Enlisted Personnel Division, as its advisory opinion. The Coast Guard "strongly recommend[ed] that the Board deny the applicant's request for relief." It stated that the applicant was identified for involuntary discharge under a program implemented by the Commandant on February 23, 1988. Commanding officers of

all units were instructed by the Commandant to identify those enlisted members "not meeting stipulated performance criteria and/or with disciplinary problems" for expedited separation.

The Coast Guard asserted that the provision of the Personnel Manual requiring a hearing before an administrative discharge board for any member with eight or more years of active duty was mere "policy" and not "required by statute or law." "Like any policy, it can be changed by the Commandant." The Coast Guard also pointed out that members with 18 years of active duty who met the involuntary discharge program criteria were "allowed to remain on active duty until 20 years service for retirement. Unfortunately, [the applicant] was a few months short of 18 years . . . ."

The applicant's attorney took sharp issue with the Coast Guard assertion that the requirement for a hearing was mere "policy" that had no binding force: "The Coast Guard cannot walk away from a published regulation."

HEARING

The applicant requested an oral hearing before the Board. The Chairman denied the request on the ground that the written record provides sufficient information to form the basis for an informed decision. The applicant's attorney notified the Board that he did not desire reconsideration of the denial.

FINDINGS AND CONCLUSIONS

The Board makes the following findings of fact and conclusions of law on the basis of the applicant's submissions, the Coast Guard's response, the military

record of the applicant, and applicable law:

1. The Board received the application within three years of the applicant's discovery of the alleged error or injustice, as required by Title 10, United States Code, §1552.

2. At the time he was honorably discharged from the Coast Guard, applicant was less than four weeks short of having been a member of that Service for eighteen years.

3. On March 22, 1988, the Commanding Officer of the cutter on which the applicant was serving recommended to the Commandant that the applicant be considered for retention in service, as an exception to the Coast Guard-wide reductions.

4. The Administrative Investigations Manual of the Coast Guard (COMDTINST. M5380.1), by its terms, "establishes procedures for the appointment, conduct and review of administrative investigations." Investigation boards are defined as "fact-finding bodies which are necessary or desirable in administering the Coast Guard but which are not specifically authorized or required by other regulations . . ." It was issued in November 1987.

Section 6-L-1 lists those occasions when an Administrative Discharge Board must be convened:

> *General.* For the most part, enlisted personnel of the Coast Guard may not be separated from the Service with an other than honorable discharge unless they have been provided the opportunity to appear before an administrative discharge board. Similarly (with a few exceptions), enlisted personnel of the Coast Guard with more than 8 years total service may not be de-

> nied reenlistment, or be separated prior to the end of an enlistment, unless they have been provided the opportunity to appear before an administrative discharge board. Boards for this purpose are conducted largely in accordance with the rules for formal boards of investigation convened pursuant to this manual as modified by this section and article 12-B of the Personnel Manual, COMDTINST. M1000.6, particularly articles 12-B-5, 12-B-31, and 12-B-32. This section sets forth certain provisions unique to these boards (emphasis supplied).

5. Article 6-L-6 of the Administrative Investigations Manual provides:

> *Scope of Inquiry*. An administrative discharge board shall endeavor to develop fully the respondent's conduct, competency, background, character and attitudes, in order that the Commandant may make a fair determination as to retention or discharge. All pertinent testimony from superiors and shipmates, and all pertinent records bearing upon his desirability of retention shall be introduced. A respondent who chooses to testify shall be subject to full interrogation on all aspects bearing on the desirability of retention, subject only to paragraph 2-D-1.h.

6. The requirement of a discharge board for a member who has served at least eight years in the Coast Guard appears in two manuals: the Personnel Manual

and the Administrative Discharge Manual. The Commandant's directive, ALCOAST 022/88, did effectively rescind certain provisions of the Personnel Manual, as it expressly stated that involuntary discharges were to be issued under Article 12-B-12a(1) of that Manual. The Board agrees with Coast Guard's assertion that the Commandant may suspend the hearing requirements because an ALCOAST, a telegraphic "message-type" directive, may be issued only by Chief of Staff or above and is controlling over all other internal communications. HQINST M5402.3C. However, this ALCOAST did not reference and therefore did not rescind the requirement of a discharge board under the Administrative Investigations Manual, which was published shortly before the ALCOAST's transmission. The provision contained in the latter manual states that members with more than eight years of service may not be discharged without an administrative hearing, at which they have the right to appear by counsel and to present and cross-examine witnesses. This requirement was still in effect when applicant's involuntary discharge was executed. Article 6-L-1 expressly states that it may only be modified by provisions of the Personnel Manual. The Personnel Manual, while it may change the procedural routine of the boards set up by the Administrative Investigations Manual, can never wholly cancel them. The ALCOAST's attempt to do so was thus ineffectual.

7. The Coast Guard committed error by summarily discharging applicant without a hearing, in contravention of Article 6-L-1 of the Administrative Investigations Manual. ALCOAST 022/88 did not do away with these hearing rights which are saved to members who have served more than eight years. It expressly cancelled only Personnel Manual provisions, not those under the Investigations Manual.

The detailed safeguards and the openness of the proceedings inherent in an administrative discharge board were wrongfully denied this member, even though he was given an honorable discharge. This applicant who, under normal circumstances, would have known the composition of the panel reviewing he record, and would have been entitled to counsel, here was separated against his will without the benefit of these important safeguards, despite his immediate command's recommendation that he be retained.

8. The applicant has not established that the contested performance evaluations were the product of bias or discrimination.

ORDER

The military record of former BMC Stephen C. Vierrether, 499 56 5277, USCG shall be corrected by directing that his discharge be voided and his record show that he served continuously for twenty years, at which time he retired. The Coast Guard shall pay the applicant the amount due him as a result of this correction.

[SIGNATURES OF BCMR MEMBERS]

APPROVED: DATE: [UNDATED]

[UNSIGNED]
Rosalind A. Knapp
Deputy General Counsel
Delegate of the Secretary
Department of Transportation

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF
MILITARY RECORDS

Application for Correction of Coast Guard Record of:	)	BCMR Docket No. 278-88
VIERRETHER, STEPHEN C. 499 56 5277, BMC	)	Decision of the Deputy General Counsel

This case involves the validity of a 1988 Coast Guard reduction-in-force (RIF) program, as it applied to a member who had almost 18 years of active duty service before his RIF became effective. On February 23, 1988, the Commandant implemented an involuntary discharge program for enlisted personnel, to achieve personnel reduction goals due to severe cuts in the Coast Guard's 1988 budget.[1] Pursuant to ALCOAST 022/88, the Commandant directed commanding officers to identify those enlisted members not meeting stipulated performance criteria or those with disciplinary problems, for a convenience of the Government separation, under section 12-

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[1] The Commandant has general authority over Coast Guard personnel. *See, e.g.*, 14 U.S.C. § 632, vesting him with the power to:

> " . . . issue rules, orders, and instructions, not inconsistent with law, relating to the organization, internal administration, and personnel of the Coast Guard."

B-12 a.(1) of the Personnel Manual. This section permits the Commandant to authorize or direct the separation of enlisted personnel for the convenience of the Government by means of:

> General demobilization, reduction in authorized strength or by an order applicable to all members of a class of personnel specified in the order. (*Id.*)

ALCOAST 022/88 applied to the class of members not meeting certain performance criteria or who had exhibited certain disciplinary problems, and thus instituted a valid RIF program within the meaning of the Personnel Manual provisions.

The Board for Correction of Military Records found the RIF not applicable to former chief Boatswain Mate (BMC) Vierrether, as the procedures applied to him did not afford him the right to appear before an administrative discharge board, a right the Board believed to apply under the Coast Guard Administrative Investigations Manual (Administrative Manual). The Board accordingly would correct the applicant's record to void his discharge and to show that he served continuously for 20 years, thus being eligible for retirement benefits.[2]

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[2] The applicant also complained that certain of his performance evaluations and related "page 7 entries" contained marks and comments that should be discounted as aberrational and as products of bias or discrimination. The Coast Guard's August 31, 1988 advisory opinion stated that the marks were low due to the applicant's poor performance during the reporting period in question. The Board found that the applicant did not

I adopt the Board's Summary of Record and Submissions, but I do not concur in the Board's conclusion that the Coast Guard erred in discharging former BMC Vierrether without a hearing, or in this Board's action to correct the applicant's record and void his discharge. I find the absence of an administrative discharge board hearing in these circumstances did not constitute an error or an injustice.

The applicant had argued that the ALCOAST Notice 022/88 could not, by itself, amend the Personnel Manual so as to suspend an enlisted member's right to a hearing before an administrative discharge board. The Coast Guard disagreed, referring to statutory and regulatory authority giving the Commandant the power to modify or rescind the provisions of the Personnel Manual relating to discharge of regular enlisted members. The Board correctly agreed with the Coast Guard and found that ALCOAST 022/88 effectively suspended the right to a hearing before an administrative discharge board by a member with over 8 years of service and facing separation prior to the end of his or her enlistment. This right is otherwise contained in Article 12-B-5, of the Coast Guard Personnel Manual. (*See also* Board Decision at 5, ¶ 6).

The Commandant's authority to issue, modify and rescind regulations regarding Coast Guard functions derives from his general statutory powers (14 U.S.C. §§ 93 and 632) as well as from those delegated to him by the Secretary of Transportation. (14 U.S.C. §§ 531 and 633; 33 C.F.R. §1.05-1). His authority specifically to

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establish that the contested performance evaluations were the products of bias or discrimination. (Finding #8). I concur with this finding.

terminate contracts of regular enlisted members is provided in 10 U.S.C. § 1169, under delegation from the Secretary. Pursuant to this delegation, the Commandant had promulgated Chapter 12-B of the Personnel Manual, prescribing procedures for discharging enlisted members. ALCOAST 022/88, published pursuant to internal guidelines, legitimately suspended the application of Article 12-B-5 and the function of the administrative discharge boards for members with eight or more years of military service.

Accordingly, although Article 12-B-5 of the Personnel Manual generally gives members with eight or more years of service, who are about to be separated prior to the end of their enlistments, the right to an administrative discharge board proceeding, the Commandant could and did suspend this policy by ALCOAST 022/88.

I disagree with the Board's reliance on the *Administrative* Manual as a basis for relief. The Board found that this manual provides an independent right to a member with more than eight years of services of an administrative discharge board proceeding in the event of separation prior to the end of his or her enlistment. (Section 6-L-1, COMDTINST M5380.1 series.) The Board went on to find that ALCOAST 022/88 did not reference this manual and thus the Commandant did not effectively suspend its provisions.

The Administrative Manual creates no independent right on the part of a Coast Guard member for such a hearing. The obvious purpose of the language relied upon by the Board (in Section 6-L-1) is to briefly describe rights to hearings afforded under *other* authority. Moreover, the Administrative Manual implements, and is subsidiary to, the Personnel Manual, describing its functions as a "general guide for investigations." In the

event of a conflict between the other regulations and those contained in this manual, the other regulations would govern. (*See* the November 6, 1987 transmittal by the Coast Guard Chief of Staff, distributing COMDTINST M5830.1, the Administrative Investigations Manual, at ¶1. and ¶3.a.)

In fact, Section 6-L-1 of the Administrative Manual (relied on by the Board) reinforces this conclusion. It is prefaced by the permissive phrase, "for the most part," and it plainly recognizes "exceptions" to the opportunity for administrative discharge board proceedings. More importantly, this portion of the manual recognizes that the boards of investigation must conform to the provisions of Article 12-B of the Personnel Manual. Section 6-L-1 states, in pertinent part:

> . . . [Administrative discharge] [b]oards . . . are conducted largely in accordance with the rules for formal boards of investigation convened pursuant to this manual *as modified by* this section and *article 12-B of the Personnel Manual, COMDTINST M1000.6* . . .

(Administrative Manual, section 6-L-1, emphasis supplied).

In this case, ALCOAST 022/88 suspended the right to an administrative discharge board contained in the Personnel Manual, Article 12-B-5. Procedures for such boards, contained in the Administrative Manual, are subject to the provisions in Article 12-B of the Personnel Manual. Given that the Personnel Manual clearly governs, the guidelines contained in the Administrative Manual must fall.

Even assuming *arguendo* that the Administrative Manual does present an independent right to a hearing on the part of a Coast Guard member with over eight years of service, I find the Commandant effectively suspended this right by explicitly referring to "the requirement for administrative discharge boards for members with 8 or more years of military service: in the ALCOAST 022/88. His intent was clear; the fact that section 6-L-1 was not specifically referenced, if error at all, was harmless error.

In terms of procedural fairness to the applicant, it must be remembered that a service member does not have a right to remain in the military service until the end of his or her enlistment. *Giglio v. United States*, 17 Cl. Ct. 160 (1989), citing *Keef v. United States*, 185 Cl. Ct. 454 (1968). Additionally, "[m]ere expectations to remain on active duty so as to achieve a military retirement, is not the stuff that due process rights are directed at." (*Id.*) A discharge under honorable conditions carries no stigma and may be accomplished administratively. (*Id.*; *see also*, *Jones v. United States*, 7 Cl. Ct. 673 (1985). I find no injustice in the RIF program at issue as it was directed towards former BMC Vierrether.

Accordingly, I deny relief.

Date: April 18, 1991

/s/
Rosalind A. Knapp
Deputy General Counsel
Department of Transportation
as designated by the Secretary

U.S. House of Representatives
Committee on
Merchant Marine and Fisheries
Room 1334, Longworth House Office Building
Washington, DC 20515-6230

May 30, 1990

Docket 46911
Documentary Services Division, C-55
U.S. Department of Transportation
Room 4107
400 Seventh Street, S.W.
Washington, D.C. 20590

Gentlemen:

As Chairman and Ranking Minority Member of the House Merchant Marine and Fisheries Committee, we are writing to comment on proposed regulations concerning the Board for the Correction of Military Records (BCMR) of the Coast Guard, published on April 30, 1990 (*Federal Register*, Volume 55, Number 83, pages 18001-18005). These regulations implement section 212 of the Coast Guard Authorization Act of 1989, Public Law 101-225.

While we are pleased that the proposed regulations were published in such a timely manner, we are very disappointed with their content. Specifically, the definition of a "complete application" is directly contrary to Congressional intent. The proposed regulations state that a "complete application" consists of: (1) the application and any supporting evidence; (2) the applicant's military record: (3) any relevant medical records; (4) the written views of the Coast Guard; (5) the applicant's

rebuttal of the Coast Guard's views: and (6) any hearing. As the authors of section 212 of the Coast Guard Authorization Act of 1989, it was not our intent to include the Coast Guard's views, the applicant's rebuttal, and the hearing in the requirements for a complete application. In fact, the section-by-section analysis for the Coast Guard Authorization Act of 1989 that appeared on page H-9311 of the November 21, 1989, *Congressional Record* clearly provides:

> ". . . This section requires that an application for relief be complete before the ten-month time period begins. An application is complete when the military records of the applicant and any applicable Veterans Administration medical records have been received by the BCMR. This requirement should not be used by the BCMR to unreasonably extend the 10-month time period. For example, the time period necessary to complete a hearing, including oral argument, is included in the 10-month period."

We first became aware of the problems with the BCMR when a group of past and present Coast Guard personnel sued the BCMR over delays in processing applications for relief. It is our understanding that delays in obtaining Coast Guard comments and in completing hearings due to an inadequate number of BCMR staff are the two main reasons that applications to the BCMR for relief are processed so slowly. The inclusion of Coast Guard comments and the hearing in the requirements of a "complete application" will render a ten-month limitation for reaching a final decision on an application meaningless.

Please amend the proposed regulations to conform to the Congressional intent of section 212 of the Coast Guard Authorization Act of 1989.

With kind regards, we are

Sincerely,

WALTER B. JONES
Chairman

ROBERT W. DAVIS
Ranking Minority Member